



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1094

WILLIAM G. BARNES,

vs.

Petitioner,

CITY OF PHILADELPHIA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

Jurisdiction

This Court has jurisdiction to review the judgment of the Superior Court of Pennsylvania either by certiorari, under authority of Judicial Code, sec. 237b, 43 Stat. 937, 28 U. S. C. A. 344b, or by Appeal under authority of Judicial Code, sec. 237a, 43 Stat. 937, 28 U. S. C. A. 344a, since there was drawn in question the validity of a statute of the State of Pennsylvania on the ground of its being repugnant to the Constitution of the United States and the decision of the court was in favor of its validity. A municipal ordinance enacted by virtue of power delegated by the legislature of the state is a state law within the meaning of the Judicial Code which confers jurisdiction on

this Court. *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U. S. 548, 34 S. Ct. 364; *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716. In *United States, et al. v. Allegheny County, Pa.*, 322 U. S. 174, 64 S. Ct. 908, this Court reviewed by appeal.

The Superior Court of Pennsylvania entered its judgment on November 19, 1945. The Supreme Court of Pennsylvania is the highest court in that state and it declined discretionary review on January 11, 1946. This petition is therefore timely and is properly addressed to the Superior Court of Pennsylvania. *American Railway Express Co. v. Levee*, 263 U. S. 19, 44 S. Ct. 11.

II

ARGUMENT

The City of Philadelphia Does Not Have Jurisdiction to Tax the Income of a Resident of New Jersey Who Is Employed in the Navy Yard at League Island.

League Island lies on the westerly bank of the Delaware River, just above the mouth of the Schuylkill River, and originally was a part of the City of Philadelphia. The Commonwealth of Pennsylvania, by the Acts of March 29, 1827, P. L. 153; February 10, 1863, P. L. 24; and April 4, 1866, P. L. 96, granted consent to the United States government, inter alia, to purchase and acquire, for naval and other purposes, a tract of land in the City and County of Philadelphia, known as League Island; and also ceded to the Federal government the right to exclusive jurisdiction thereover, providing, however, "That the cession * * * made shall continue in force so long as the * * * territory shall be used by the government of the United States for the purposes of a navy yard, and no longer: And provided, also, That all process, civil and criminal, of the commonwealth of Pennsylvania, shall extend into, and be

effectual, within the territory hereby ceded, as if this law had not passed." Pursuant to appropriate federal legislation, approved February 18, 1867, 14 U. S. St. at L., c. 46, p. 396, a Certificate of Acceptance of this tract in the City and County of Philadelphia, dated December 23, 1868, was recorded in the office of the Recorder of Deeds in Philadelphia County in Volume 19 (J. T. O. 2), Miscellaneous Land Records, p. 208. The Certificate of Acceptance appears in the Appendix, p. 32.

Since that time League Island has been under the exclusive jurisdiction of the Federal government save for the minor exception as to service of process noted above.

The Pennsylvania legislature, on August 5, 1932, P. L. 45, sec. 1, 53 P. S. 4613, authorized cities of the first and second classes to tax generally all subjects of taxation which the state may tax but which it has not yet taxed "within the limits of such city of first and second class." The City of Philadelphia is a city of the first class.

Section 3 of the same Act, 53 P. S. 4615, provides:

"The council of cities of the first and second classes shall have power to prescribe and enforce penalties for the nonpayment, within the time fixed for their payment, of taxes imposed under authority of this act, and for the violation of the provisions of ordinances passed under authority of this act."

The Act of March 25, 1929, P. L. 66, No. 75, sec. 1, 53 P. S. 3451, provides as follows:

"The cities of the first class of this Commonwealth shall have the power to make all such ordinances, by-laws, rules, and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth as may be expedient or necessary for the proper management, care, and control of the city and its finances, and the maintenance of the peace, good government, safety, and welfare of the city and its

trade, commerce, manufactures; and the exercise of full and complete powers for local self-government in matters of police, and the same to alter, modify and repeal at pleasure; and to enforce all ordinances by imposing fines upon inhabitants or other persons for violation thereof, not exceeding one hundred dollars for any one offense, recoverable with costs, together with judgment of imprisonment not exceeding thirty days if the amount of said fines and costs shall not be paid into the court imposing the fines within ten days from the date of the imposition thereof."

In pursuance of these acts the City Council of Philadelphia passed the Ordinance which is questioned in the present case.

Section 2 imposes an annual tax for general revenue purposes "on (a) salaries, wages, commissions and other compensation earned after January 1, 1940, by residents of Philadelphia; and on (b) salaries, wages, commissions and other compensation earned after January 1, 1940, by non-residents of Philadelphia for work done or services performed or rendered in Philadelphia; * * *"

Section 3, provides that "Each person whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 15th of each year, make and file with the Receiver of Taxes a return on a form furnished by or obtainable from the Receiver of Taxes, setting forth the aggregate amount of salaries, wages, commissions and other compensation or net profits earned by him during the preceding year and subject to the said tax, together with such other pertinent information as the Receiver of Taxes may require; * * *"

Section 9, provides that "Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Re-

ceiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

Section 10, provides that "This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for."

The Ordinance was sustained by the Supreme Court of Pennsylvania when attacked by a Philadelphia resident in *Dole v. Philadelphia*, 337 Pa. 375, 11 A. 2d 163, 767; also when attacked by an employe of the Commonwealth who was required to reside in Philadelphia in *Marson v. Philadelphia*, 342 Pa. 369, 21 A. 2d 228.

The Congress of the United States, on October 9, 1940, enacted Public Act No. 819. Section 2 of that Act, 54 Stat. 1060, 4 U. S. C. A. 14, provides as follows:

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and

such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

Section 4 of that Act provides as follows:

"The provisions of sections 1-6 shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area."

In Section 6, the term "Federal area" is defined as follows:

"The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State shall be deemed to be a Federal area located within such State."

Thereafter, the City sought to enforce the ordinance against various groups of Federal employees. A resident of Philadelphia, employed in a Federal area, challenged the validity of the tax as applied to him but his contention was rejected in *City v. Schaller*, 148 Pa. Super. 276, 25 A. 2d 406. The Supreme Court of Pennsylvania refused an allocatur and this Court refused to issue a writ of certiorari. 317 U. S. 649, 87 L. Ed. 522. Thereafter, the ordinance was again attacked by a New Jersey resident performing services at the League Island Navy Yard but his contention was dismissed by the Supreme Court of Pennsylvania in *Kiker*

v. *Philadelphia*, 346 Pa. 624, 31 A. 2d 289, in an Opinion by Mr. Justice Drew, concurred in by Justices Linn, Parker and Stearne. Chief Justice Maxey filed a dissenting opinion joined in by Mr. Justice Patterson. Mr. Justice Stern took no part in the consideration or decision of the case. This Court again refused to issue a writ of certiorari. 320 U. S. 741, 88 L. Ed. 439. All these cases were Bills in Equity seeking prior restraint of enforcement. The present case is the first and only one where a trial has been had which involves the penalty provision of the ordinance.

Petitioner believes that this Court has not decided the questions raised by the present record. In the courts below, the City has emphasized the two refusals of this Court to grant certiorari. But the settled policy of the Court has been that it will not exercise any previous restraint over the enforcement of a state taxing statute or ordinance.

The present question is whether the City of Philadelphia has "jurisdiction" to tax petitioner's income. There would appear to be little doubt that prior to the passage of Public Act 819 neither the State of Pennsylvania nor the City of Philadelphia had the right to tax persons or property at League Island Navy Yard. A State is without power to impose any taxes on persons or property or any piece of land it has owned but over which it ceded to the Federal government a grant of exclusive jurisdiction. *Standard Oil Co. v. California*, 291 U. S. 242, 244, 54 S. Ct. 381, 382; *Arlington Hotel Co. v. Fant*, 278 U. S. 439, 49 S. Ct. 227; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455. The State of Pennsylvania did cede exclusive jurisdiction over League Island to the Federal government.

The United States acquired title to the League Island Navy Yard under Article 1, Section 8, Clause 17 of the Federal Constitution which gives Congress power "to exercise exclusive legislation" over "all places purchased by

the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." The "exclusive legislation" stated therein is consistent only with "exclusive jurisdiction." *Surplus Trading Co. v. Cook, supra*; *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208.

The reservation of the right to send criminal or civil process into League Island applies only to actions begun in state courts for matters which occurred within the jurisdiction of the state and not those which occurred in League Island itself. This Court, in *United States v. Unzeuta*, 281 U. S. 138, 50 S. Ct. 284, 285, speaking of a similar cession by the State of Nebraska of land which later became the Fort Robinson Military Reservation, said:

"The conditions of the cession relating to the execution of criminal process were construed as intended to save the right to execute process within the reservation for crimes committed outside; that is, to prevent the reservation from being a sanctuary for fugitive offenders."

The Supreme Court of Pennsylvania in the *Kiker* case, followed by the Superior Court in the present case, while conceding that at the time the ordinance was passed it did not and could not apply to persons such as petitioner, held that Public Act No. 819 removed the disability. Petitioner contends that it did not. Much that petitioner would say in his brief has been said for him in the dissenting opinion of Chief Justice Maxey in the *Kiker* case, 31 A. 2d 289, 298, *et seq.* It would serve no useful purpose to repeat those views here. Briefly, however, petitioner submits that prior to the passage of Public Act No. 819, the City of Philadelphia could not tax petitioner, for two reasons:

First, he was and is a resident of New Jersey and receives no reciprocal benefits from it;

Second, he did not work nor have property within the limits of the City.

Public Act No. 819, of itself, did not remove either of these disabilities. Besides, the ordinance has not been amended, nor has the Pennsylvania legislature enacted any legislation, since the passage of Public Act No. 819. It is therefore pertinent to note that the ordinance, which had no application to petitioner at the time of its passage, provided in section 10: "This ordinance shall not apply to any person or property as to whom or which it is beyond the legal power of Council to impose the tax or duties herein provided for." Neither Public Act No. 819 nor any legislation of the State of Pennsylvania placed the Navy Yard at League Island within the taxing power of Philadelphia, whatever effect that Act had to locate it for taxing purposes within the State of Pennsylvania.

Section 6 of the Act, 4 U. S. C. A. 18, provides that a Federal area within the exterior boundaries of any state shall be deemed to be a Federal area within such state; but the Act does not say that such Federal area is deemed to be located within a particular municipality.

Petitioner submits, therefore, that this Act does not, in the absence of some other legislation, vest taxing authority in the City of Philadelphia. The municipal corporation of a state has no inherent power to tax and must take such power as is conferred under the conditions and limitations that may be prescribed and only in such cases and within such limits as are expressed. *Cooley on Taxation*, 4th Ed., Vol. 1, Sec. 125. See *Passenger Railway Co. v. Pittsburgh*, 226 Pa. 419, 75 A. 662; *Arthur v. School District of Polk Borough*, 164 Pa. 410, 30 A. 299. The grant of a right to a municipal corporation to levy taxes is strictly construed and not extended by implication. *Hillman Coal and Coke Co. v. Jenner Township, Somerset County*, 300 Pa. 108, 150 A. 293.

In *Frick v. Pennsylvania*, 268 U. S. 473, 489, 45 S. Ct. 603, 604, this Court said:

“It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the state, but property which is wholly and exclusively within the jurisdiction of another state, receives none of the protection for which the tax is supposed to be the compensation.”

Petitioner believes, therefore, that he, as a New Jersey resident, has a right to resist a tax imposed by the City of Philadelphia where there is no express authority granted to that municipality by the Pennsylvania Legislature to tax persons working in League Island. The Supreme Court of Pennsylvania in the *Kiker* case (31 A. 2d at 297) held that the words “having jurisdiction to levy such a tax” as used in Public Act 819 simply means “the power of the taxing authority to impose the type of tax mentioned; it does not refer to its jurisdiction over the territory.” The Superior Court in the present case followed the *Kiker* case. But petitioner suggests that the language and analogy cited in the report of the sub-committee of the Committee on Finance of the United States Senate, quoted in the *Kiker* case (31 A. 2d at 296) shows that the purpose of the Act was to remove the exemption from income taxes “where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area.” The analogy given is between a naval officer who, being assigned for duty at the Naval Academy, secures quarters at the Academy and one also assigned there who is forced to seek quarters in the State of Maryland. Petitioner concedes that Public Act 819 sought to eliminate such discriminations. Petitioner denies,

however, that the purpose of Public Act 819 was to create a situation where Maryland could tax a naval officer assigned to duty at the Naval Academy at Annapolis but who lived in Virginia. Besides, in *Rivera v. Buscaglia*, 146 F. 2d 461 (1 Cir.) the Circuit Court of Appeals, speaking of the language used in the Public Salary Tax Act of 1939, 53 Stat. 574, said:

“The phrase ‘having jurisdiction to tax such compensation’ means that the taxing body must have authority to impose income taxes and that the particular federal employee is within its taxing jurisdiction, as the committee report makes clear. See S. Rep. No. 112, 76 Cong., 1 Sess., p. 11. It was so held in *Yerian v. Territory of Hawaii*, 1942, 9 Cir., 130 F. 2d 786, a case upholding an income tax imposed by the Legislature of Hawaii as applied to the salaries of federal employees.”

The Penal Provision of the Ordinance Is Invalid Because the Police Power of the City to Punish Offenses Created by It Does Not Extend to League Island Navy Yard.

As noted above an Act of the Pennsylvania Legislature of March 25, 1929, P. L. 66, Section 1, 53 P. S. 3451, provides:

“Be it enacted, &c., That the cities of the first class of this Commonwealth shall have the power to make all such ordinances, by-laws, rules, and regulations not inconsistent with or restrained by the Constitution and laws of this Commonwealth as may be expedient or necessary for the proper management, care, and control of the city and its finances, and the maintenance of the peace, good government, safety, and welfare of the city and its trade, commerce, manufactures; and the exercise of full and complete powers for local self-government in matters of police, and the same to alter, modify and repeal at pleasure; and to enforce all ordinances by imposing fines upon inhabitants or other

persons for violation thereof, not exceeding one hundred dollars for any one offense recoverable with costs, together with judgment of imprisonment not exceeding thirty days if the amount of said fines and costs shall not be paid into the court imposing the fines within ten days from the date of the imposition thereof."

In alleged pursuance of this Act the City Council of Philadelphia passed the Ordinance which is questioned in the present case. Section 9 provides as follows:

"Sect. 9. VIOLATIONS; PENALTIES. Any person who shall fail, neglect or refuse to make any return required by this Ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this Ordinance, or any person who shall refuse to permit the Receiver of taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense, or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.

Such fine or penalty shall be in addition to any other penalty imposed by any other section of this Ordinance.

The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

It is readily seen that this section of the Ordinance is a penal provision in that it creates an offense and punishes a violation by fine or imprisonment. The City of Phila-

delphia did not proceed as for a summary offense before a magistrate but instead brought suit in the Common Pleas Court for collection of the fine by issuing a writ of *capias ad respondendum*. This fine, although collected by civil proceeding, would seem clearly to be substantively purely penal and results in imprisonment if it is not paid. It is in no sense a civil penalty such as that contained in Section 7, which reads as follows:

“Sect. 7. INTEREST AND PENALTIES. All taxes imposed by this ordinance remaining unpaid after they become due shall bear interest in addition to the amount of the unpaid tax at the rate of six per centum per year, and the persons upon whom said taxes are imposed shall be further liable to a penalty of one-half of one per centum of the amount of the unpaid tax for each month or fraction of a month for the first six months of non-payment.”

The Superior Court of Pennsylvania, in the present case, agreed that this fine was a criminal penalty in holding that even though the form of the suit was civil the defendant could not be called for cross-examination, could not be compelled to give evidence against himself and plaintiff's counsel could not adversely comment upon his failure to testify. A suit for a penalty is a “criminal case” within the meaning of the Fifth Amendment to the United States Constitution. *Boyd v. United States*, 116 U. S. 616, 6 S. Ct. 524. It is a “criminal prosecution” within the meaning of Article 1, Section 9 of the Pennsylvania Constitution. *Boyle v. Smithman*, 146 Pa. 255, 23 A. 397; *Logan v. Pennsylvania R. R. Co.*, 132 Pa. 403, 19 A. 137; *Osborn v. First National Bank*, 154 Pa. 134, 26 A. 289.

Petitioner submits, therefore, that in view of the fact that the Federal government still has title to and exclusive territorial jurisdiction and police power over the League

Island Navy Yard, the City of Philadelphia could not denominate as an offense conduct committed in the Navy Yard and proceed to punish it. Unless the municipality has territorial jurisdiction over the place where the offense is committed it is without authority to punish it. *Frick v. Pennsylvania*, 268 U. S. 473, 489, 45 S. Ct. 603, 604; *United States v. Unzeuta*, 281 U. S. 138, 50 S. Ct. 284.

The evidence in the case shows that petitioner was never within the limits of the City of Philadelphia proper. He does not pass through that City going to or returning from work (R. 80a-81a). Therefore, if any offense was committed, it was committed by petitioner either in the Navy Yard itself or in the State of New Jersey where he resides. The City of Philadelphia sought to obtain a penal judgment, non-payment of which would result in imprisonment, for failure to file a report as to petitioner's income. That was the issue submitted to the jury (R. 116a). Where is this offense committed? The City argues that it took place at the office of the Receiver of Taxes in Philadelphia where the Ordinance, by Section 3, provided that the report should be sent. But the Ordinance does not even require that the return be personally delivered by the taxpayer. Even if it did, petitioner submits that Philadelphia could not compel a resident of New Jersey to come within its jurisdiction under pain of imprisonment for disobedience. Certainly it cannot do so unless he is otherwise subject to its jurisdiction, such as for instance if he had been subpoenaed while at the Navy Yard in a judicial matter then pending in Philadelphia. It seems clear that if it be true that Philadelphia cannot directly denominate as offenses acts committed within the Navy Yard it cannot indirectly achieve the same result. The venue of an offense is the place where the act or failure to act takes place. Here, petitioner's failure took place either in the Navy Yard or in the State of New Jersey,

both of which are without the territorial boundaries of the City. In a proceeding instituted for recovery of a penalty the record must show that the offense occurred within the corporate limits of the municipality. *Philadelphia v. Nell*, 3 Yeates 475.

Public Act No. 819 does not alter the exclusive territorial jurisdiction of offenses committed within Federal areas. In fact, it specifically preserves that jurisdiction unfettered. Section 4, 54 Stat. 1060, 4 U. S. C. A. 16. For purposes of levying and collecting taxes Federal areas located within the exterior boundary of a state are deemed by Section 6 of that Act to be a Federal area located within such state, but nothing in that Act or in any Act of the Pennsylvania Legislature extended the police power of the City of Philadelphia to the Navy Yard. Hence, the Navy Yard is without the police power of Philadelphia just as much as it is without the police power of any other municipality of the Commonwealth of Pennsylvania.

Therefore petitioner respectfully submits that the penal provision of this Ordinance cannot be sustained.

Respectfully submitted,

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